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In The
Supreme Court of the United States

ALEX RUDAJ,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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January 28, 2010

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QUESTIONS PRESENTED

Whether, under the Fourth Amendment to the United States Constitution, government agents who arrest and handcuff a partially dressed defendant at his front door are authorized to enter his home -- *without a search warrant or consent* -- and then search through his bedroom and closets, and seize property, based on a claim that they were obtaining clothing for him.[1]

Whether the protective sweep doctrine, which allows officers to conduct a quick and limited warrantless search incident to an arrest, of places where someone may be hiding, can be expanded to include closets in a bedroom that the officers enter to obtain clothing for a partially-clothed arrestee, especially where they had no reasonable belief that anyone was hiding anywhere in the house. U.S. Const. amend. IV.[2]

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[1] The scale and urgency of this question are amplified by a direct conflict between the Second Circuit and the Sixth Circuit on this issue.

[2] The Second Circuit's extension of the protective sweep exception to situations that are not incident to an arrest stands in sharp conflict with the Tenth Circuit.

PARTIES TO THE PROCEEDING

Petitioners in this Court, defendants-appellants below, are: Alex Rudaj, Prenka Ivezaj, Nardino Colotti, Angelo DiPietro, Nikola Dedaj, and Ljusa Nuculovic.

To avoid unnecessary duplication, Alex Rudaj, who is the only Petitioner in this submission, joins in any and all arguments made by his co-defendants in their separately filed petitions for certiorari, to the extent that they are not inconsistent with the relief sought herein. *See* Rule 12.4.

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Petitioner Alex Rudaj respectfully requests that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on June 11, 2009.

OPINIONS BELOW

On October 3, 2005, Judge Denise L. Cote, in the Eastern District of New York, denied the Petitioner's motion to suppress evidence seized during a warrantless search of his home. *United States v. Rudaj*, 390 F. Supp. 2d 395 (E.D.N.Y. 2005). App.36-61.

A panel of the Second Circuit affirmed the convictions of the Petitioner and his co-defendants on June 11, 2009. The court issued a published decision, which addressed the suppression and other issues. *United States v. Ivezaj*, 568 F.3d 88 (2d Cir. 2009). App.1-26. The Second Circuit also issued an unpublished summary order, which focused on certain trial issues. App.27-35.

A timely petition for rehearing and suggestion for rehearing *en banc* was denied on August 31, 2009. App.62-63.

JURISDICTION

The Court of Appeals' judgment was entered on June 11, 2009. The Second Circuit denied rehearing by an order entered on August 31, 2009. The 90-day period for filing this petition for certiorari would have expired on November 29, 2009. However, on October 14, 2009, Justice Ruth Bader Ginsburg granted Application No. 09A343 extending the time to file until December 30, 2009. And, on December 16, 2009, Justice Ginsburg extended the time to file until January 28, 2010.

This Court's jurisdiction to review the Second Circuit's decision is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The Warrantless Search of Alex Rudaj's Bedroom

In the early morning hours of October 26, 2004, Alex Rudaj answered the door to his home and a team of FBI agents arrested him on the front step. Petitioner was taken back inside, handcuffed, and held downstairs with his wife and young children while agents dashed upstairs and entered the couple's bedroom. Even though they did not have a search warrant, consent, or any reason to believe that anyone was hiding inside, the agents, acting pursuant to a preconceived plan, thoroughly searched the marital bedroom -- including its closets. Their hunt through Rudaj's bedroom and closets uncovered rifles and boxes of handgun ammunition, which the agents seized (A.23-36, 189).

Petitioner was subsequently charged with a variety of offenses, including gambling and extortion, as well as using and carrying a firearm in connection with the offenses. A chief part of the government's case was built on the boxes of ammunition that were seized, without a warrant, from dark corners of the bedroom closet during the search.

Alex Rudaj's motion to suppress evidence seized from his bedroom was denied by the district judge. The court held that the agents' entry into the upstairs bedroom was permissible to obtain clothing for Rudaj because he was wearing a t-shirt and boxer shorts when arrested by the agents. The trial judge also ruled that the agents were authorized to search through closed closets as part of a "protective sweep" incident to their warrantless entry into the bedroom, even though there was no reason to believe that anyone was hiding anywhere in the house (A.335-41; App.36-61).

The Prosecutor Exploited the Evidence Seized from Alex Rudaj's Closet at Trial

The prosecutor repeatedly exploited the guns and ammunition, as well as other items seized from the bedroom, by acknowledging in summation that the government's case was "established" through physical evidence obtained from searches, including those conducted of Rudaj's bedroom closets (Tr.9167).[3] The prosecutor also urged, "it appears that Rudaj still favors the 9-millimeter, since he had 9-millimeter ammunition in his closet on the day his house was searched" (Tr.9203)(emphasis supplied).

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[3] The judge admitted into evidence two rifles, a replica handgun and boxes of ammunition found in Alex Rudaj's closet, as well as two hunting rifles, money and master lock keys from the bedroom (A.334; App.56-57, 61).

Moreover, the prosecutor was able to argue that, as a result of the search, the jury need not rely on the testimony of the government's witnesses, which had been severely impeached, because of the "physical evidence" seized from the Rudaj bedroom (Tr.9320). She then proclaimed that

> although there were no handguns found in Rudaj's closet along with the rifles, there were partial boxes of handgun ammunition for two different sized handguns, a .357 and 9-millimeter, suggesting that Rudaj had either elsewhere in the house, at another location, or at some other time possessed these kinds of handguns (A.389).

In the face of this armory of weapons seized from his bedroom, the jurors, after deliberating for five full days, convicted Alex Rudaj. He was sentenced to imprisonment for 20 years, to which a consecutive sentence of seven years was bolted on for use of a firearm under 18 U.S.C. § 924(c). (A.431).

The Second Circuit's Decision

On appeal, the court noted that when Alex Rudaj answered the door, the agents "accompanied him inside, purportedly to get him dressed." The court held that it was permissible for the agents to go upstairs and enter his bedroom, while he was handcuffed downstairs, to find clothing for him and seize incriminating evidence in plain view (App.18-21).

However, the court declined to decide whether a protective sweep can be extended to justify the seizure of articles from an upstairs bedroom closet. *Id.* The panel believed such a determination was not necessary because the receipt in evidence of several rifles and boxes of ammunition, all taken from Petitioner's bedroom closet, was harmless. App.22-23.

REASONS FOR GRANTING CERTIORARI

In the history of ideas, the right to be left alone ranks as one of the highest. Thus, a central purpose of the Fourth Amendment is to safeguard that great right. Police officers should not have the unbridled discretion to rummage at will among an individual's personal effects without first obtaining a warrant. Nevertheless, the rule in the Second Circuit now permits agents to arrest a person outside his home and, if he is not fully dressed at the time, enter one of the most private of all places -- his bedroom -- and conduct a roaming search, *without a warrant or consent*, under the claim that they are obtaining clothing for him to wear while he is in custody.

And, through a harrowing bootstrapping process, agents in the Second Circuit are now empowered to *open closets* in an arrestee's bedroom under a claim that they are conducting a "protective sweep" in connection with their entry into the bedroom to obtain clothing. Thus, even though, as here, the defendant is handcuffed and held downstairs -- and *never asks for any clothing* -- the agents are still authorized to search his bedroom and closets.

The court of appeal's decision, upholding such a warrantless entry and search of a bedroom, pursuant to a "clothing exception" to the Fourth Amendment's warrant requirement, stands in stark conflict with an authoritative decision from the Sixth Court and is bound to have profound consequences concerning the protections provided by the Constitution. Furthermore, the Second

Circuit's expansion of the protective sweep exception to situations that are not incident to an arrest conflicts directly with the Tenth Circuit.

This case, which involves two critical Fourth Amendment issues upon which *the circuits are radically divided*, presents a perfect platform for resolving recurring issues that are bound to continue to plague the Court.

I. POLICE OFFICERS SHOULD NOT BE PERMITTED TO CONDUCT A WARRANTLESS SEARCH IN A PARTIALLY DRESSED ARRESTEE'S BEDROOM FOR CLOTHING UNLESS THE ARRESTEE REQUESTS ADDITIONAL CLOTHING

The Fourth Amendment mandates that before the police can enter a person's home, a neutral magistrate must weigh the competing considerations of law enforcement against the right of privacy afforded any person under the Fourth Amendment. This key constitutional virtue, often overlooked by law enforcement officers, ensures that only through the intervention of an impartial judicial officer can these rival interests be fairly adjusted.

Because of the exalted place the right of privacy occupies in our hierarchy of constitutional values, "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment -- subject only to a few specifically established and well-delineated exceptions."[4]

Law enforcement officers have been steadily chipping away at the foundation of this constitutional bulwark that safeguards our homes from warrantless searches. This erosion of the Fourth Amendment is being accomplished through exceptions to the warrant requirement, which have never been approved by this Court.[5]

Perhaps the most alarming "exception," which urgently warrants review by the Court, is the so-called "clothing exception," which allows an officer's warrantless entry into a home to obtain clothing for a partially dressed person under arrest.

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[4] *Katz v. United States*, 389 U.S. 347, 357 (1967) (footnote omitted). *See also Payton v. New York*, 445 U.S. 573, 586 (1980).

[5] The *government* bears the "heavy burden" of proving that the search was reasonable under the Fourth Amendment. *And*, if they claim that an *exception* to the warrant requirement applies, they must prove the need for invoking that imperative. *See Coolidge v. New Hampshire*, 403 U.S. 443, 474-75 (1971).

This exemption, which *allows wide discretion to police officers*, does *not* fall within any of the "specifically established" and "well-delineated" exceptions authorized by this Court. Instead, the courts of appeals, which are drastically divided on this issue, have created a critical and highly suspect exception, which, unless corrected, will seriously curtail the traditional protection afforded the home.

The Court of Appeals Authorizes the Police to Enter an Arrestee's Home and Obtain Clothing for Him

Despite the constitutional mandates of the Fourth Amendment, the court of appeals has approved the warrantless entry into a person's home, and search of his bedroom, under the pretense that the officers are retrieving clothing for him. That simple statement suggests the awful solemnity of the occasion that requires this Court's intervention.

The rule in the Second Circuit is chilling: Officers can now enter a defendant's home when the defendant is arrested in a state of undress. And, once inside the home and bedroom, the officers can seize, at will, any evidence that they observe in plain view.[6]

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[6] App. 20-21, citing *United States v. Di Stefano*, 555 F.2d 1094, 1101 (2d Cir. 1977).

However, the protections afforded by the Fourth Amendment do not disappear merely because a defendant is not wearing a three-piece suit when the police arrive. Moreover, absent consent, entry into private spaces -- such as the marital bedroom -- should not be based on law enforcement officers' desire to complete an arrestee's wardrobe!

The "Clothing Exception" Cannot be Justified as Part of the "Exigent Circumstances Exception" Because a Police Officer's Desire to Have an Arrestee Complete His Wardrobe is Not an Emergency

The government may urge that the clothing exception has its foundation in the "exigent circumstances exception," which authorizes a warrantless search where there is a need to act quickly and it is impractical for the police to obtain a warrant. *See, e.g., Vale v. Louisiana*, 399 U.S. 30, 35 (1970). Those types of exigent circumstances have been limited to *true emergencies*, such as "hot pursuit of a fleeing felon, or imminent destruction of evidence," or the "need to prevent a suspect's escape, or the risk of danger to the police or to other persons inside or outside the dwelling." *See Minnesota v. Olson*, 495 U.S. 91 (1990). No such acute or life-threatening circumstances are presented by a police officer's wish to obtain additional clothing for a defendant.

Furthermore, absolutely no standards exist as to *when* an arrestee is sufficiently underdressed as to justify a warrantless intrusion into his bedroom. For example, is a coat required? What about a sweater? Shoes? Socks? A jacket and tie? Raincoat? Moreover, is the Fourth Amendment less revered in the winter, when a police officer may believe that the arrestee should be wearing a sweater? What about gloves and a hat on a snowy day?

Such considerations may seem farfetched, but they are very real. Alex Rudaj was wearing a t-shirt and boxer shorts when a team of federal agents executed an arrest warrant at his home at 6:30 in the morning.

If this unprecedented decision from a prominent circuit is allowed to stand uncorrected, then the sanctity of homes across the nation will be at grave risk because it authorizes the unlimited rummaging by federal agents through an arrestee's bedroom and closets under the pretext that the agents were looking for clothing that a defendant could wear to his arraignment.

What is worse, the broad discretion given to police officers actually encourages them to arrest defendants at hours when they would most likely be in their bedclothes, which would empower the police to search homes without obtaining a search warrant. This, obviously, would have a profound effect on the fundamental protections of the Fourth Amendment.

However, if the need to obtain clothing for a partially dressed defendant is to become an "established" exception to the Fourth Amendment's warrant requirement, then we urge, most respectfully, *this* Court should make that determination and resolve this recurring issue definitively once and for all.

"The House of Every One is to Him as his Castle and Fortress, as Well as for his Defense against Injury and Violence as for his Repose" – Sir Edward Coke

These words, uttered by Sir Edward Coke, Chief Justice of the King's Bench, in 1604, are just as true today as they were back then.[7] Moreover, nowhere in the world is the inviolability of the home more protected than in the United States. This high regard for privacy can be traced back to the 18th Century, when British soldiers searched, at will, the homes of our founding fathers.[8]

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[7] *Semayne's Case*, 77 Eng. Rep. 194, 195 (1604).

[8] To "determine what is an 'unreasonable' search within the meaning of the Fourth Amendment, we look first to the historical protections the Framers sought to preserve." *See Arizona v. Gant*, 129 S. Ct. 1710, 1724 (2009) (Scalia, J., concurring).

Distress over unwarranted intrusions into the privacy of citizens was a major cause of the Revolutionary War. And, in due course, the Framers took infinite pains to ensure that the sanctity of our homes was *constitutionally* guaranteed by including that indispensable safeguard in our Bill of Rights.[9]

This short historical background serves as a reminder that the protections of the Fourth Amendment are as essential now as they were back in colonial times. Today *all* Americans should feel safe in the knowledge that the Constitution protects them from *unwarranted* searches and seizures.

However, under the rule in the Second Circuit, the government no longer needs to meet its heavy burden of establishing any exigencies to overcome the warrant requirements of the Fourth Amendment. Instead, now, federal agents may enter the home of a defendant, who is under arrest, to ensure that he is properly attired before leaving his residence. And, they may now search through his bedroom at will without bothering to fulfill the constitutional requirements of probable cause, as well as the other prerequisites that accompany a search warrant.

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[9] The remarkably plain language, adopted by the Framers of the Constitution, guarantees to the people the right to be secure in their homes against unreasonable searches and seizures.

II. THE SECOND CIRCUIT'S CLOTHING EXCEPTION TO THE WARRANT REQUIREMENT CONFLICTS WITH THE LAW OF THE SIXTH, NINTH AND TENTH CIRCUITS

The need for this Court's resolution of these important constitutional issues is further heightened since circuit courts across the country are distinctly *divided* on the very issues presented by this case. Significantly, the First, Fourth, Fifth and Tenth Circuits join with the Second Circuit and permit officers to enter a home, without a warrant or consent from the defendant, to retrieve clothing for an inadequately dressed individual in police custody.

For instance, the First Circuit held, in *United States v. Nascimento,* 491 F.3d 25, 50 (1st Cir. 2007), *cert. denied*, 128 S. Ct. 1738 (2008), it was proper for the police to escort the defendant, who was clad only in his underwear, into his bedroom to retrieve clothing, and the police may conduct a brief search of the closet where the clothing is located. Similarly, in *United States v. Gwinn,* 219 F.3d 326 (4th Cir.), *cert. denied*, 531 U.S. 1025 (2000), the court found no Fourth Amendment violation where arresting officers entered a defendant's home to get a shirt and shoes for him to wear. And, a search of the shoe retrieved, which contained a pistol, prior to giving it to the defendant was proper.

Similarly, in *United States v. Wilson*, 306 F.3d 231 (5th Cir. 2002), the Fifth Circuit determined that the need to get clothes for a suspect, who was arrested on the sidewalk wearing only boxer shorts, can constitute exigent circumstances permitting a warrantless entry into a suspect's home or room.[10] Furthermore, once in the home, the police can search individuals found inside.

Finally, in *United States v. Butler*, 980 F.2d 619, 621-22 (10th Cir. 1992), the Tenth Circuit found that police officers were permitted to enter a defendant's home to retrieve shoes where, based on extensive litter, including broken glass, on the ground, there is a significant and legitimate threat to the defendant's health and safety posed by his bare feet.

In stark contrast, the Sixth, Eighth and Ninth Circuits have unequivocally held that the state of a defendant's dress, who was arrested outside the home, does *not* create any exigency to permit a warrantless entry into the defendant's home.

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[10] Overruled on other grounds, *United States v. Gould*, 364 F.3d 578 (5th Cir.) (*en banc*), *cert. denied*, 543 U.S. 437 (2004).

For example, in *United States v. Kinney*, 638 F.2d 941 (6th Cir.), *cert. denied*, 452 U.S. 918 (1981), the court held that where the defendant was arrested on the porch of his apartment building and the only other person believed to be involved in the offense was already in custody, there was neither a necessity nor exigent circumstances authorizing the warrantless entry into the defendant's apartment, even though the defendant was only partially dressed and it was March in Ohio.

Moreover, in *United States v. McMullin*, 576 F.3d 810, 817 (8th Cir. 2009), a defendant's lack of a shirt at the time of arrest did not constitute exigent circumstances to permit a warrantless entry into the home to search for proper clothing. And, in *United States v. Whitten*, 706 F.2d 1000, 1016 (9th Cir. 1983),[11] the court found that absent a "specific request" for clothing or consent to enter, *officers may not go into the hotel room of a defendant who was arrested in his underwear in the doorway.*

In addition, the Second Circuit's broad approach, which fails to consider the *pretextual* nature of the officers' conduct, actually conflicts with the more cautious approach embraced by the other circuits that have adopted a clothing exception. For example, the Fourth Circuit is careful to warn "against using a clothing exception as a cover for entries made for other purposes." The court stressed that an "essential premise" for its application of the clothing exception is the fact that

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[11] Overruled on other grounds as recognized by *United States v. Rodriguez-Rodriguez*, 441 F.3d 767 (9th Cir. 2006), *cert. denied*, 129 S. Ct 290 (2008).

nothing in the record suggests that the officer's reason for the reentry into the defendant's home was pretextual or that he acted in bad faith. *Gwinn*, 219 F.3d at 335.

Similarly, the First Circuit upheld the warrantless entry because the police neither manipulated the situation nor used the defendant's state of undress as a pretext to carry out an otherwise impermissible search. *Nascimento*, 491 F.3d at 50. And, in *Butler*, the Tenth Circuit noted that the police intrusion was limited to getting the defendant clothing. 980 F.2d at 621-22.

This stance against the pretextual application of the clothing exception clashes with the Second Circuit's decision in the current case. Here, the record established that prior to arriving at Rudaj's home the government had assembled a fully outfitted search and seizure team to hunt through the home for evidence. This squad included (1) a designated agent in charge of all seizures; (2) an agent assigned to photograph *all places searched* and to take pictures of *all items seized*; (3) agents assigned to search the premises, as well as (4) agents designated to stay with Alex Rudaj's wife and children while the search was implemented (A.228, 243, 246).[12]

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[12] Agent Gregory Massa, the designated photographer, knew that the agents were going to be in the Rudaj home "for a period of time" (A.241).

The pretextual nature of the search is further supported by the fact that (1) Alex Rudaj remained handcuffed downstairs during the entire search; (2) no agent ever accompanied him to the bedroom to pick out any clothing; (3) no agent ever selected any clothing; and, significantly, (4) the agent in charge *did not even know how Rudaj ultimately obtained clothing* to wear over his shorts and T-shirt (A.191, 192, 246).

This issue is of considerable importance to judges, prosecutors and defense attorneys who have been calling for its clarification. Not surprisingly, this constitutional question has spawned debate across the nation. And, legal scholars have noted that circuit court decisions that endeavor to carve out a "clothing exception" do "little more than *add to the confusion*" surrounding the uncertain standards of what warrantless searches are reasonable. *See, e.g.*, Marc May, *No Shirt, No Shoes, No Fourth Amendment Protection: The Fifth Circuit's Decision in United States v. Wilson*, 20 T.M. Cooley L. Rev. 99, 100 (2003) (emphasis supplied).[13]

This clear split among the circuit courts adds force to the magnitude of this debate. Furthermore, without resolution, this issue will continue to fester and generate more conflicts.

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[13] *See also* Darrel C. Waugh, *Constitutional Law -- Developing Guidelines in Fourth Amendment "Clothing Cases" after United States v. Butler*, 16 W. New Eng. L. Rev. 289 (1994).

Now is the time for this Court to resolve this growing conflict of authority. And, this case provides the Court with a perfect platform to formulate that resolution.

III. THE PROTECTIVE SWEEP DOCTRINE SHOULD NOT BE EXTENDED TO AUTHORIZE POLICE OFFICERS TO SEARCH THROUGH CLOSED CLOSETS IN CONNECTION WITH THEIR ENTRY INTO AN ARRESTEE'S BEDROOM TO OBTAIN CLOTHING THEY BELIEVE IS NECESSARY TO COMPLETE HIS ATTIRE

This case also presents questions left unanswered by this Court in *Maryland v. Buie*, 494 U.S. 325 (1990), on which there is another clear conflict among the circuits, concerning the scope of the "protective sweep" exception to the Fourth Amendment's warrant requirement.

In *Buie*, the Court held that "as an incident" to an arrest, officers may "look in closets and other spaces immediately adjoining the place of arrest from which an attack could immediately be launched." 494 U.S. at 334. And, a more wide-ranging sweep may only be conducted if the officers have "articulable facts which would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Id.*

The *Buie* doctrine, which was *limited to searches incident to an arrest*, has now been radically enlarged to authorize officers to open closets in an upstairs bedroom -- far from where the handcuffed defendant is held in police custody -- as a "protective sweep" *incident to the agent's separate entry into the bedroom to obtain clothing for the defendant* (App.51-57). *See also United States v. Miller*, 430 F.3d 93 (2d Cir. 2005), *cert. denied*, 547 U.S. 1206 (2006). Thus, the Second Circuit has broadened the scope of the narrow confines of the protective sweep doctrine developed in *Buie*.

The approach in this case is particularly unsettling where the district court expressly found that the agents could not justify their search of the bedroom's closets as a protective sweep incident to Alex Rudaj's arrest because (1) he was handcuffed downstairs and (2) the agents had *no* "articulable facts that support an inference that the area to be swept harbors an individual posing danger to those present" (App.44-45).

Nevertheless, despite that unequivocal finding, the court concluded that the closets were properly searched as a protective sweep incident to the agents' "separate legal entry" into the Rudaj residence to obtain clothing pursuant to the Second Circuit's "clothing exception" (App.46-48).

The Second Circuit's Expansion of the Protective Sweep Doctrine is in Direct Conflict with the Tenth Circuit

Significantly, other courts -- including the Eighth and Tenth Circuits -- have rejected the Second Circuit's approach and recognized that protective sweeps are only permitted incident to an arrest. *See, e.g., United States v. Torres-Castro*, 470 F.3d 992, 996 (10th Cir. 2006), *cert. denied*, 550 U.S. 949 (2007) (noting the conflict among the circuits); *United States v. Waldner*, 425 F.3d 514 (8th Cir. 2005) (declining the government's invitation to extend *Buie* further).

Not surprisingly, efforts to inflate the parameters of *Buie*'s protective sweep doctrine have caused considerable conflicts across the nation.[14] And, as a consequence, this Court is routinely being burdened with petitions from federal and state defendants urging a final resolution of this recurring question.[15]

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[14] *See* Leslie A. O'Brien, *Finding a Reasonable Approach to the Extension of the Protective Sweep Doctrine in Non-Arrest Situations*, 82 N.Y.U. L. Rev. 1139, 1139 (Oct. 2007) (noting the discord among the Circuits and that this Court "has not clarified whether the protective sweep doctrine applies where there is no arrest"); Edward J. Loya, Jr., *Sweeping Away the Fourth Amendment*, 1 Stan. J. Civ. Rts. & Civ. Liberties 457, 458 (Aug. 2005) (confirming that the "Circuits are now split on this question").

[15] *See, e.g., Miller v. United States*, No. 05-1042, *cert. denied*, 547 U.S. 1206 (2006) ("[d]oes the Fourth Amendment permit a protective sweep where the police are in someone's home for reasons other than making an arrest?"); *Bui v. Massachusetts*, No. 95-9, *cert. denied*, 516 U.S. 861 (1995) ("whether police

The Second Circuit's Rule Also Conflicts with this Court's Recent Decision in *Arizona v. Gant*

The issues presented are further amplified by the recent decision in *Arizona v. Gant*, 129 S. Ct. 1710 (2009), where the Court held that it was unreasonable for police officers to search a defendant's car while he was being held, in handcuffs, outside of the vehicle. Thus, the officers had to demonstrate some threat to their safety in order to justify a warrantless search of the vehicle.

Under the Second Circuit's approach, however, a defendant's *home* may be searched -- while he is handcuffed downstairs -- without any showing that the officers are exposed to any harm! To the contrary, the trial judge specifically found that there was no articulable basis to believe that any portion of the Rudaj house harbored an individual posing a danger to the agents (App.45).

Such a jarring result -- which exposes our homes to greater risk than our cars -- cannot be reconciled especially since "a motorist's privacy interest in his vehicle is *less substantial than in his home*." *Gant*, 129 S. Ct. at 1720.

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officers' warrantless protective sweep of a home -- without any arrest and including areas where no person could be concealed -- violates the Fourth Amendment as construed in *Maryland v. Buie*, ... as to which the courts of appeals are in conflict").

Moreover, the sheer scale of these issues is evidenced by the fact that there are 8.6 million homes in the Second Circuit that may now be searched pursuant to far-reaching expansions of the protective sweep exception to the Fourth Amendment's strict warrant requirements!

The Issues are Ripe for Resolution

The issues presented by this case are ripe for resolution despite the court of appeals' mistaken belief that the seizure of an array of guns, ammunition and other evidence, which the agents unlawfully took from bedroom closets, can be excused under the doctrine of "harmless error" (App.22).

The principal virtue of the Fourth Amendment is in combating *arbitrary police action involving intrusions* into the sanctity of one's home. Every member of the public has a stake in seeing that the protections of the Fourth Amendment are enforced. As such, here, Petitioner *and* the *public* are entitled to have this Court determine whether the police acted unlawfully in entering Alex Rudaj's home, without a search warrant or consent, and conducting a search of his bedroom closets.

The decision in this case, if left uncorrected, is bound to foment confusion in this important field of law where certainty is critical to guide the actions of police officers who obtain a large measure of their evidence through searches and seizures. Furthermore, a rule, which, in effect, exonerates a Fourth Amendment violation by attempting to

inoculate the fruits of the illegal search and seizure with the antidote of harmless error defeats the very purpose of the exclusionary rule, which is to deter such unconstitutional practices of the police.

Finally, our greatest fear is that the mobility of the "protective sweep" -- especially taken in combination with the Second Circuit's "clothing exception" -- will be so easily manipulated as to become an "Open Sesame" to all of our bedrooms and closets. Moreover, the government will continue to abuse the protective sweep doctrine to sweep away the warrant requirements of the Fourth Amendment -- and, in that way, the privacy rights of all people will be placed at grave risk.

Alex Rudaj joins in any and all arguments made by his co-defendants in their petitions for certiorari to the extent that they are not inconsistent with the relief sought herein. *See* Rule 12.4.

CONCLUSION

For all these reasons, as well as those advanced in the petitions of Alex Rudaj's co-defendants, the Petitioner prays that a writ of certiorari issue to review the Second Circuit's opinion in this case.

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Respectfully submitted,

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